BLANK

PAGE

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 13 1966
JOHN F. DAVIS, CLERK

No. ~~1129~~ 89

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

ROY WALKER, *Petitioner,*

v.

SOUTHERN RAILWAY COMPANY, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JEROME ACKERMAN
701 Union Trust Building
Washington, D. C. 20005
Attorney for Respondent
Southern Railway Company

Of Counsel:

COVINGTON & BURLING

April 12, 1966

BLANK

PAGE

TABLE OF CONTENTS

	Page
Opinions Below	1
Question Presented	2
Statement	2
Reasons for Denying the Writ	4
Conclusion	14

TABLE OF CITATIONS

Cases:

Beebe v. *Union R.R.*, 208 A.2d 16 (1965) 8

International Assn. of Machinists v. *Central Airlines, Inc.*, 372 U.S. 682 (1963) 6, 7, 8

Moore v. *Illinois Central R.R.*, 312 U.S. 630 (1941) ..5, 6, 7, 8, 9, 14

Neal v. *System Board of Adjustment*, 348 F.2d 722 (8th Cir. 1965) 8

Railway Workers Employment Council v. *B. & O. R.R.*, —— F.Supp. ——, 52 CCH Labor Cases 23,596 (S.D.N.Y. 1965) 8

Republic Steel Corp. v. *Maddox*, 379 U.S. 650 (1965) 4, 5, 6, 7, 8, 9, 10, 12

Slocum v. *Delaware L. & W. R.R.*, 339 U.S. 239 (1950) 5, 11, 12, 14

Textile Workers v. *Lincoln Mills*, 353 U.S. 448 (1957) 6, 7, 8

Transcontinental & Western Air, Inc. v. *Koppal*, 345 U.S. 653 (1953) 5, 6, 7

Wade v. *Southern Pacific Co.*, 243 F.Supp. 307, (D. Tex. 1965) 8

Statutes:

Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 141 *et seq.* .....Passim

Railway Labor Act, as amended, 45 U.S.C. § 151 *et seq.* .....Passim

BLANK

PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1129

ROY WALKER, *Petitioner,*

v.

SOUTHERN RAILWAY COMPANY, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, which is reported at 354 F.2d 950 (1965), is printed at pages 7-11 of the Appendix to the Petition. The opinion of the United States District Court, which is reported at 237 F. Supp. 278 (1965), is printed at pages 1-7 of the Appendix to the Petition.

QUESTION PRESENTED

Whether in a suit for breach of a collective bargaining agreement under the Railway Labor Act, federal laws governs the question whether a plaintiff must exhaust his contractual and administrative remedies before commencing the suit?

STATEMENT

From 1944 until March 3, 1957, petitioner worked intermittently as a fireman for respondent. During the period of petitioner's employment, he and respondent's other firemen were represented by the Brotherhood of Locomotive Firemen and Enginemen, a labor union. The terms and conditions of petitioner's employment were governed by the provisions of the collective bargaining agreement between the said union and respondent. Petitioner has conceded that his cause of action in this proceeding is based exclusively on the said collective bargaining agreement, and that he has no common law contract. Tr. 135.

On March 3, 1957, petitioner was displaced on his job by another fireman because of the latter's higher seniority. Under the collective bargaining agreement, when an employee is displaced for this reason, he is required within six days "to place himself" in employment to which his seniority entitles him. Tr. 103. When petitioner was displaced on March 3, 1957, he could have "placed himself" in employment by "marking up" for the so-called "extra board." Tr. 41, 43-4. Petitioner did not do this even though it would only have entailed advising a clerk in respondent's local office to place petitioner's name on the extra board. Tr. 43, 44. Instead, when petitioner left the respondent's premises on March 3, 1957, he simply stated to a

crew clerk that he was sick and was going home. Tr. 43. Petitioner did not advise any of his superiors that he was going home or that he was sick. Tr. 43.

Having had no indication on or after March 3, 1957, that petitioner desired to continue in the employ of respondent (Tr. 98-100), on April 29, 1957, respondent's division superintendent wrote the following letter to petitioner:

> "I understand you were displaced from a regular job at Air Line Junction, March 3, 1957 and have idled yourself since.
>
> "This is to advise you that you stand for work on your seniority and unless you protect your seniority standing within 30 days from the date of this letter, you will have forfeited your seniority." D.Ex. 1[1]

A copy of this letter was simultaneously forwarded to petitioner's local union representative, and the letter itself was delivered to petitioner's home the following day. Petitioner actually saw the letter two days later.

As of midnight on May 28, 1957, petitioner had failed to protect his seniority and respondent accordingly treated it as having been forfeited. A letter to this effect was mailed from Greenville, South Carolina. on May 30, 1957, to petitioner by respondent's superintendent. D.Ex. 3. On the preceding day, May 29, 1957, petitioner had appeared at respondent's office in Charlotte, North Carolina, seeking to protect his

---

[1] Art. 25(e)(3) of the applicable collective bargaining agreement provided:

> "When hired engineers or firemen are laid off on account of reduction in service, they will retain all seniority rights; provided, they return to actual service within thirty (30) days from the date their services are required."

seniority, but was advised that it had been terminated at midnight on May 28, 1957, by reason of his prior inaction.

Petitioner then complained to the Brotherhood of Locomotive Firemen and Enginemen about the loss of his seniority. Tr. 40, 53-5. Petitioner concedes, however, that he neither pursued the contractual grievance procedure to its conclusion or attempted to have the matter considered by the National Railroad Adjustment Board. Tr. 81-4, 118. It is, therefore, plain that petitioner did not exhaust his contractual or administrative remedies.

Instead, more than six years after the termination of his seniority, petitioner instituted this suit to recover damages for breach of contract and reinstatement. The portion of petitioner's complaint seeking reinstatement was dismissed by order of the lower court on July 16, 1964, as a result of voluntary abandonment of it by petitioner.

The District Court awarded petitioner damages in the sum of $4,500. The Court of Appeals reversed the District Court's decision and ordered that the complaint be dismissed on the ground that the rationale of this Court's decision in *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965) was applicable to suits on collective bargaining agreements under the Railway Labor Act.

REASONS FOR DENYING THE WRIT

The decision of the court below is a clearly correct application of the rationale of *Maddox*. Indeed, in the face of *Maddox*, the court below could hardly have reached any other result.

This court ruled in *Maddox* that state law was inapplicable to the question of whether Maddox should

have exhausted his contractual remedies before instuting a breach-of-contract suit under a collective bargaining agreement covered by the Labor Management Relations Act. The court held that, instead, the general rule in cases to which federal law applies should govern. That rule requires exhaustion of contractual or administrative remedies before the institution of a lawsuit.

> "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress . . . . unless the contract provides otherwise [footnote omitted], there can be no doubt that the employee must afford the union the opportunity to act on his behalf. Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant." 379 U.S. 652-3.

It is plain from the discussion in *Maddox* of *Slocum*,[2] *Moore*,[3] and *Koppal*,[4] that those cases no longer support the proposition that state law governs the question of whether an employee suing for breach of a contract covered by the Railway Labor Act must first exhaust his remedies under the contract. In *Maddox*, the issue was whether following an employee's discharge, his suit for severance pay under a collective bargaining agreement covered by the Labor Management Relations Act should be barred by his failure to exhaust con-

---

[2] Slocum v. Delaware L.&W. R.R., 339 U.S. 239 (1950).

[3] Moore v. Illinois Central R.R., 312 U.S. 630 (1941).

[4] Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653 (1953).

tractual remedies. The employer argued that federal law applied, and that under it the suit was barred. *Maddox,* on the other hand, urged that the decisions in *Moore* and *Koppal* warranted an exception to application of federal law.

Although in *Moore* and *Koppal* this Court had held that the Railway Labor Act did not bar suits for damages for wrongful discharge because of failure to exhaust administrative remedies, and that state law governed this question, the Court rejected Maddox's argument. The Court said:

> "Federal jurisdiction in both *Moore* and *Koppal* was based on diversity; federal law was not thought to apply merely by reason of the fact that the collective bargaining agreements were subject to the Railway Labor Act. Since that time the Court has made it clear that substantive federal law applies to suits on collective bargaining agreements covered by § 204 of the Railway Labor Act, *International Assn. of Machinists* v. *Central Airlines, Inc.,* 372 U.S. 682, and by § 301(a) of the LMRA, [Labor Management Relations Act] *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448. *Thus a major underpinning for the continued validity of the* Moore *case in the field of the Railway Labor Act, and more importantly in the present context, for the extension of its rationale to suits under § 301(a) of the LMRA, has been removed.*" 379 U.S. 655 (Emphasis added.)

Even without the above-quoted italicized language, it is inconceivable that the rule established by *Moore* and *Koppal* could survive the decision in *Maddox.* Once the Court held in *Maddox* that state law had no application to exhaustion of remedies questions in breach-of-contract cases arising under the Labor Management Relations Act, *Moore* and *Koppal* were drained of all

vitality. The reason is that the Court's decision in *Maddox* was bottomed on its earlier decision in *Lincoln Mills, supra,* holding that substantive federal law governed suits on collective bargaining agreements under the Labor Management Relations Act. Since *International Ass'n of Machinists* v. *Central Airlines,* 372 U.S. 682 (1963), had also established that substantive federal law applied to suits on collective bargaining agreements covered by the Railway Labor Act, it follows that the rationale of *Maddox* overruled *Moore* and *Koppal.*

In *Central Airlines,* the issue was whether a suit to enforce an arbitration award by a System Board of Adjustment could be brought in a federal district court in the absence of diversity of citizenship. The lower courts had held in the negative. This Court reversed, holding that substantive federal law governed and that therefore federal jurisdiction existed without any need for diversity.

The major policy consideration expressed in *Central Airlines* was the need for uniformity in the resolution of questions arising under contracts covered by the Railway Labor Act. The Court also adverted to the Congressional desire for resolution of disputes arising under collective bargaining agreements without strikes.[5]

---

[5] This was, of course, the reason for the establishment by Congress in 1934 of the National Railroad Board of Adjustment under Title I of the Railway Labor Act and for the provision in Title II requiring air carriers and unions to establish System Boards of Adjustment. Under the scheme of the Act, disputes as to the interpretation or application of airline or railroad collective bargaining agreements are ultimately settled through arbitration by either the National Railroad Board of Adjustment or, in the case of the airlines, by a System Board of Adjustment. Strikes are not permitted in connection with such disputes.

Although the issue in *Central Airlines* arose under Title II of the Railway Labor Act because the defendant was an airline, the rationale of the decision is equally applicable to Title I which covers collective bargaining agreements entered into by railroads. There is no difference between Title I and Title II of the Railway Labor Act which would warrant any other conclusion. Indeed, both titles establish essentially the same rights and obligations with respect to the carriers and unions covered by each.

Thus, if, as the Court said in *Maddox,* application of state law to the question of exhaustion of remedies in contract suits arising under the Labor Management Relations Act is "incompatible with the precepts of *Lincoln Mills* and cannot be accepted" (379 U.S. 656), it would be equally incompatible with the precepts of *Central Airlines* to apply state law to the question of exhaustion of remedies in contract suits arising under the Railway Labor Act.[6]

Although, as the Court pointed out in *Maddox,*[7] the decision in *Moore* was based in part on the use of permissive, rather than mandatory, language in the

---

[6] Other federal courts also apparently regard the rationale of *Maddox* as applicable to cases arising under the Railway Labor Act. Neal v. System Board of Adjustment, 348 F.2d 722, 727 (8th Cir. 1965); Wade v. Southern Pacific Co., 243 F.Supp. 307, 312 (D. Tex. 1965); Railway Workers Employment Council v. B.&O. R.R., —— F.Supp. ——, 52 CCH Lab. Cases 23,596, 23,598-9 (S.D.N.Y. 1965); see also Beebe v. Union R.R., 208 A.2d 16 (1965). These decisions appear to share the view expressed by Mr. Justice Black in his dissent in *Maddox,* that *Moore* and *Koppal* had, as a practical matter, been overruled. See 379 U.S. 667. It does not appear that any federal court has held to the contrary. But cf. in re Certain Carriers, 53 CCH Lab. Cases 16,533 (D.C.D.C. 1966).

[7] 379 U.S. 654.

Railway Labor Act with respect to referral of contract interpretation disputes to the National Railroad Adjustment Board, this has no bearing on the present issue. For the permissive language of the Act was germane in *Moore* only in the context of a belief that substantive state law could govern suits on contracts covered by the Railway Labor Act. In that context, it was pertinent to consider whether anything in the language of the Act itself overrode state law on the issue of exhaustion of remedies. However, now that it has been established that state law is inapplicable—and this is inescapably the effect of *Maddox*—the federal rule with respect to exhaustion applies.[8] And federal law, as enunciated in *Maddox*, plainly requires exhaustion at least with respect to contractual remedies,[8] and unless tenuous distinctions are to be drawn, with respect to National Railroad Adjustment Board remedies as well.

Moreover, referral of contract interpretation disputes to compulsory arbitration is permissive only in the sense that neither a railroad, an airline or a union is compelled to refer every dispute to an Adjustment Board. They may, of course, resolve any dispute short of that step. But, as a practical matter, any unresolved dispute must be submitted to an adjustment board since there is no other way in which it can be resolved. Unions cannot lawfully strike over such disputes, and they are not likely to accede to the railroad or airline without exhausting their statutory right to arbitration.

---

[8] This alone is fatal to the petitioner in this case since he conceded that he neither exhausted his contractual remedies nor attempted to proceed before the National Railroad Adjustment Board.

The cardinal policy considerations which impelled the conclusion reached in *Maddox* with regard to exhaustion of contractual remedies are no less pertinent to cases arising under the Railway Labor Act. Thus, the Court could have been speaking of either that Act or the Labor Management Relations Act when it said:

> "Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.
>
> "A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a law suit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.'" 379 U.S. 653.

One of the theoretical reasons for permitting common law actions for wrongful discharge without ex-

haustion of contractual or administrative remedies is that such an action does not involve questions of future relations between the railroad and its other employees, or that if it does, the decision will not constitute a binding precedent. *Cf. Slocum* v. *Delaware L.&W. R.R.*, 339 U.S. 239, 244 (1950).

Yet this is not at all the case here. In the instant case, the question of whether the termination of petitioner's employment was wrongful turns entirely on interpretation of the 30-day provision contained in Article 25(e)(3) of the collective bargaining agreement. The question is how, in the context of the railroad industry, time is to be computed under such a provision. Specifically, should the first day of such a period be included and the last excluded, or should the first day be excluded and the last included? Tr. 85-90. Or might there be still another proper interpretation of this provision as applied to the facts here? There cannot be the slightest doubt that the resolution of such questions would have a significant effect on future relations between the railroad and its other employees.[9] It is likewise idle to suppose that a court decision on such questions would not be regarded as a compelling precedent.

Apart from this, there is even more justification here for application of the federal rule requiring exhaustion. In this case, the understanding and custom of the industry were of paramount importance to a proper construction of the somewhat unusual language employed in the collective bargaining agreement (Tr.

[9] Indeed, the resolution of such questions could lead to a demand by either the railroad or the union for a modification of the language of the collective bargaining agreement.

96-8, 114-8, 131-4), and in the correspondence between respondent's superintendent and petitioner. Tr. 71-7, 88-90. It is obvious that if the case had reached it, the National Railroad Adjustment Board would have been particularly well qualified to pass upon the questions involved. Even the District Court below recognized that the railroad jargon was unusual and that the Board served an important purpose in this regard Tr. 88-90, 133-4. See also *Slocum* v. *Delaware L. & W. R.R., supra.*[10] In such a case there is just as much, if not more, reason for requiring exhaustion of remedies than there was in *Maddox* on the issue of severance pay.

In footnote 14 of the decision in *Maddox,* the Court said:

> "By refusing to extend *Moore* v. *Illinois Central R. Co.,* to § 301 suits, we do not mean to overrule it within the field of the Railway Labor Act. Consideration of such action should properly await a case presented under the Railway Labor Act in which the various distinctive features of the administrative remedies provided by that Act can be appraised in context, *e.g.,* the make-up of the Adjustment Board, the scope of review from monetary awards, and the ability of the Board to give the same remedies as could be obtained by court suit." 379 U.S. 657.

The administrative procedures and remedies provided by the Railway Labor Act are essentially the

---

[10] In that case the Court said:

> "The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. [Footnote omitted.] Long and varied experiences have added to the Board's initial qualifications." 339 U.S. 243.

same as those under any collective bargaining agreement which establishes arbitration as the means of resolving disputes about interpretation or application of the agreement.[11] The make-up of the Adjustment Board, in the final analysis, is equivalent to any tripartite arbitration tribunal with the power of decision left to an impartial referee.[12]

Finally, it is not open to dispute that the Adjustment Board can give at least the same remedies as could be obtained by a court suit. Indeed, no express limitation is imposed by the Act on the type of remedy which may be ordered by an Adjustment Board, and money awards are expressly provided for in Section 3, First

[11] Sections 3, First (i), (j), (k), (l), (m), (n) and (o) of the Act, in describing the procedures of the Adjustment Board, reveal nothing which differs significantly from routine labor arbitration procedures. 48 Stat. 1189, 1191-92 (1934); 45 U.S.C. § 153 (1965).

[12] Section 3, First (l) of the Railway Labor Act provides:

"Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee', to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees." 48 Stat. 1189, 1191 (1934); 45 U.S.C. § 153 (1965).

(o) of the Act. 48 Stat. 1189, 1192 (1934); 45 U.S.C. § 153 (1965). If anything, an Adjustment Board may grant an even broader remedy than a court. For the Adjustment Board has exclusive primary jurisdiction in any breach-of-contract case in which an employee seeks reinstatement. *Cf. Slocum* v. *Delaware L. & W. R.R.*, 339 U.S. 239 (1950); *Moore* v. *Illinois Central R.R.*, 312 U.S. 630 (1941).

CONCLUSION

In view of the foregoing, it is respectfully submitted that the petition for certiorari should be denied. In the alternative, if the Court feels constrained by the language of footnote 14 in *Maddox* to grant the petition, the decision of the Court below should be summarily affirmed.

Respectfully submitted,

JEROME ACKERMAN
701 Union Trust Building
Washington, D. C. 20005
Attorney for Respondent
Southern Railway Company

Of Counsel:

COVINGTON & BURLING
701 Union Trust Building
Washington, D. C. 20005

April 12, 1966

BLANK

PAGE